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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

THE HUDSON COAL COMPANY,

Petitioner,

against

ARJA WATKINS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Hudson Coal Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Circuit Court of Appeals for the Third Circuit, filed on September 5, 1945, which, by a divided court, modified an order of the United States District Court for the Middle District of Pennsylvania staying this action pending arbitration and affirming the order as modified.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a) as amended by the Act of February 13, 1925.

The opinion and order of the Circuit Court for the Third Circuit (R. 80-100) were filed September 5, 1945. Petitioner's application for rehearing was denied October 2, 1945 (R. 106).

Opinions Below

The opinion of the District Court is reported in 54 F. Supp. 953, and is also printed in the record (R. 63-72).

The majority opinion of the Circuit Court of Appeals and the opinion of Judge McAllister, dissenting in part, are reported in 151 F. 2d 311 and are also printed in the record (R. 80-100).

Questions Presented

The questions presented by this petition are:

1. Whether substantial rights of petitioner were not infringed by the action of the Circuit Court in finally determining certain issues of fact and law subordinate to the main issue found to be arbitrable, prior to any hearing on the merits before the arbitrators or before the District Court and a jury.

2. Whether a Federal Court having jurisdiction to grant, and granting, a stay of an action pending arbitration of the issue involved pursuant to Section 3 of the United States Arbitration Act (herein called the "Arbitration Act"), but having no jurisdiction affirmatively to order such arbitration pursuant to Section 4 of that Act, may finally determine issues of fact and law upon which the main issue found to be arbitrable is dependent.

3. Whether an employer may settle, *in whole or in part*, a back liability under the Fair Labor Standards Act of 1938 (herein called the Act) by the payment, for a speci-

fied period, of a greater sum as wages than the employer would have paid but for such settlement.

Statutes Involved

Pertinent provisions of the United States Arbitration Act (43 Stat. 883, 9 U. S. C., § 1, *et seq.*) and of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., § 201, *et seq.*) are set forth in the Appendix.

Statement

Petitioner is the owner and operator of anthracite coal mines in Lackawanna and Luzerne Counties, Pennsylvania. Respondents are certain of its employees in maintenance jobs known within the Industry as "occupations continuously manned".

Respondents, thirty-eight in number, brought suit for overtime and liquidated damages under the Fair Labor Standards Act of 1938. Their stated claims, including attorneys' fees, approximate $98,000. Petitioner answered, denying most of the allegations of the complaint, and alleging among other things that respondents' employment was under the terms of collective bargaining contracts made between the United Mine Workers of America, as respondents' representatives, and the Anthracite Operators, fixing wage rates and conditions of employment for the entire Anthracite Industry. As a separate and distinct defense petitioner pleaded an agreement for arbitration of all difficulties and disagreements arising out of the relation of the employers and employed, contained in such collective bargaining contracts.

The agreement for arbitration is Article IV of the Award of the Anthracite Coal Strike Commission of 1903, which has been continued in force by collective bargaining

as a part of each succeeding wage agreement.* The full text of the arbitration agreement is quoted in the Circuit Court's opinion (R. 95-96). The material part reads as follows:

> "That any difficulty or disagreement arising under this award, either as to its interpretation or application, or in any way growing out of the relations of the employers and employed, which cannot be settled or adjusted by consultation between the superintendent or manager of the mine or mines, and the miner or miners directly interested, or is of a scope too large to be so settled or adjusted, shall be referred to a permanent joint committee, to be called a Board of Conciliation, to consist of six persons, appointed as hereinafter provided. * * *
>
> "The Board of Conciliation thus constituted, shall take up and consider any question referred to it as aforesaid, hearing both parties to the controversy, and such evidence as may be laid before it by either party; and any award made by a majority of such Board of Conciliation shall be final and binding on all parties."

The separate and distinct defense of petitioner's answer was brought before the District Court upon peti-

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* The anthracite grievance procedure culminating, where necessary, in arbitration, before the Board of Conciliation is "possibly the oldest, continuous grievance adjustment set-up in the United States and Canada * * * and has been copied in many industries of the country since 1937". Between 1903 and 1941, printed reports of the Board disclose, there were 5104 cases filed with the Board, not including many more grievances settled at early stages of the procedure. 44% of all cases filed have been settled without necessity of a ruling by the Board or Umpire. Approximately 60% of the 5104 filed grievances "could be classified as 'money grievances', that is, disputes over rates and payments".

The foregoing quotations and statistics are taken from a report prepared by Dr. Thomas E. Larkin, Umpire of the Anthracite Board of Conciliation for delivery at the Fifth Annual Anthracite Conference at Lehigh University, originally scheduled for May 3 and 4, 1945, but postponed because of war conditions. The report was intended for publication with other papers prepared for the conference.

tioner's application for preliminary hearing and for stay of suit until arbitration has been had (R. 45-48). Respondents answered this application alleging that the collective bargaining agreements are illegal and void (R. 48-51).

For the purpose of such preliminary hearing and motion the parties agreed upon the following material facts (R. 52-53):

> "(1) The several contracts pleaded in Defendant's Answer were made as therein alleged and the copies thereof attached to said Answer as exhibits are true and correct copies of the original contracts.
>
> (2) The defendant, The Hudson Coal Company, is a party to these contracts.
>
> (3) Plaintiffs were members of District No. 1 of the United Mine Workers of America at all times involved in these proceedings.
>
> (4) Plaintiffs were at all times employed in 'occupations continuously manned' within the meaning of that phrase as used in the last paragraph of section (3) of the Agreement of May 7, 1936 (Answer—Exhibit M—p. 150).
>
> (5) Plaintiffs were employed at all times in occupations in and about defendant's mines necessary to the mining and preparation of anthracite coal for market in the capacities stated in the Complaint and Answer, and none of the power, electric or otherwise, produced in any plant in which any of them worked was used in transportation other than in hauling the unprepared coal out of the mines to the breaker where it was prepared for market."

The wage agreement in force on October 24, 1938, the effective date of the Fair Labor Standards Act, was the Agreement of May 7, 1936 (R. 37-39), which had been extended to April 30, 1939 by Agreement of November 13, 1937 (R. 40). By the Agreement of May 26, 1939 (R. 40-41) the wage rates of the 1936 Agreement were further ex-

tended to April 30, 1941, for all except certain employees, in respect to whom it was provided as follows (R. 41):

> "(6) The case of employees exempt from the maximum hour provisions of Section (3) of the Agreement of May 7, 1936, as covered by subsequent interpretation of the Board of Conciliation, whose rates received the seven-hour wage adjustment under the said agreement, and who are affected by the Federal maximum hour and minimum wage legislation, shall be referred to the Board of Conciliation. The Board of Conciliation, exclusive of the umpire, is authorized and instructed to make a comprehensive study of the problem and work out an arrangement within ninety days of date of this agreement covering such employees on the basis that the weekly earnings of such employees shall be equal under this agreement to the earnings of such employees under the rates now in effect, as provided under the Agreement of May 7, 1936, for equal time worked."

Pursuant to this authority the Board of Conciliation on September 5, 1939, adopted a resolution which after various recitals provided for these employees as follows (R. 44-45):

> "(1) In compliance with the basic hour and rate provision of the Fair Labor Standards Act of 1938, which provides for a maximum of forty hours per week in October, 1940, plus punitive rates for time in excess thereof, it is agreed that the forty hours per week shall be the basis for a formula, which will produce earnings that shall be the same as former earnings of such employees for equal time worked;"

Petitioner avers that effective November 1, 1939, hourly rates were adopted by it under the above resolution and thereafter paid for the duration of the 1939 Agreement for the maximum hours per week and one and one-half those rates for overtime hours (R. 18).

These same employees were again the subject of special provisions in section (7) of the Wage Agreement of May 20, 1941 (R. 42-44):

"(7) The hourly rates of employees, exempted from the provisions of the seven-hour day under the Agreement of May 7, 1936, who have not been adjusted to a forty-hour basis and who regularly worked a fixed number of hours of forty-two hours per week or more,* shall be established for the period May 1, 1941, to September 30, 1941, by adding 7½% to their weekly earnings as calculated under the provisions of said agreement and dividing the sum by the hours regularly employed weekly plus one-half the hours worked in excess of forty hours; and for the period October 1, 1941, to April 30, 1943, by adding 10% to their weekly earnings as calculated under the provisions of said agreement and dividing the sum by the hours regularly employed weekly plus one-half the hours worked in excess of forty hours.

* * * * * * * *

"The wage adjustments provided herein for employees customarily working forty-two hours a week, or more, constitute full settlement and satisfaction of all their claims, if any, for overtime against any signatory operator arising out of employment prior to May 1, 1941."

Petitioner does not claim that time and one-half was paid currently to respondents for overtime hours prior to November 1, 1939, but that overtime for the period was later paid under the last above quoted provision of the Agreement of 1941. For this period prior to November 1, 1939 there is also a disagreement between respondents and petitioner as to the hours of overtime and in some instances as to the applicable hourly rates. Subsequent to November 1, 1939, petitioner avers that it currently paid all overtime on the basis of time and one-half the

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* It is averred in paragraph XXII of the answer (R. 18-19) that "plaintiffs and each of them, are, and at all times mentioned in the complaint were, employees of the defendant, exempted from the provisions of the seven-hour day under the contract of May 7, 1936 (Exhibit M hereto), who had not been adjusted to a forty hour basis and who regularly worked a fixed number of hours of forty-two hours per week or more."

regular hourly rates provided by the Wage Agreements of 1939 and 1941. The same disagreements as to the hours of overtime and hourly rates exist for the periods subsequent to November 1, 1939, as prior thereto (R. 3-12, 21-30).*

The foregoing quotations from the contracts of 1939 and 1941 and from the resolution of the Board of Conciliation dated September 5, 1939 are the portions of the pertinent wage agreements which respondents claim are in violation of the Fair Labor Standards Act and which they contend render the entire contracts, including the provision for arbitration, illegal and void.

The District Court held that the hourly rate formulas prescribed under these agreements and resolution are valid and ruled that the provision of the Agreement of May 20, 1941, settling any back claims for overtime, whether legal or illegal, is severable from the balance of the contract. The court thereupon ordered (R. 72) that trial be stayed until arbitration has been had in accordance with the terms of the agreements set forth in the petitioner's answer. Respondents' appeal to the Circuit Court followed (For their "Statement of Points" upon appeal, see R. 75).

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* The respective allegations of the complaint and answer with respect to respondent, John Sawczak, illustrate the differences as to overtime hours and regular hourly rates. Certain slight variations in dates have been disregarded.

Period	Employee's Claim Hours	Employee's Claim Rate	Employer's Claim Hours	Employer's Claim Rate
10/24/38 to 10/23/39	614	$.7379	468	$.7379
10/24/39 to 10/23/40	718	$.7379	570	$.60
10/24/40 to 5/ 1/41	424	$.7379	280	$.60
5/ 1/41 to 10/ 1/41	333	$.7932	296	$.6938
10/ 1/41 to 10/23/41	53	$.8116	896	$.71
10/23/41 to 11/30/42	892	$.8116		

The Circuit Court of Appeals, by a divided vote, concluded that the order of the District Court staying the action pending arbitration, was correct but modified the order by directing "that the proceedings in arbitration will be conducted under the rules of law as set out herein" (that is, in the opinion). Judge McAllister, dissenting in part, thought that the definition of "commerce" contained in Section 1 of the Arbitration Act which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," extended to all provisions of the Arbitration Act, including Section 3, and forbade any stay thereunder applicable to any contract of employment.

Petitioner now seeks to review the action of the Circuit Court in modifying the District Court's order and directing that arbitration be conducted "under the rules of law" set out in the opinion. The substantial effect of the Circuit Court's opinion is to narrow the arbitration to a mere assessment of the overtime wages, if any, due respondents. This results from the fact that upon pleadings alone, without opportunity to petitioner for a plenary determination of facts either by the arbitrators or by the District Court and a jury, the Circuit Court has ruled that petitioner never actually paid or applied the agreed or "formula" hourly rates; as *obiter dictum*, that the formulas for determining hourly rates are insufficient under the Fair Labor Standards Act; and that the settlement contained in the Agreement of May 20, 1941 is ineffective for any purpose under the decision of this Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697.

REASONS FOR GRANTING WRIT

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(A) Petitioner has been denied its "day in court" by the Circuit Court's so-called "modification" of the District Court's order.

Is there an agreement in writing for arbitration? Is the issue involved in respondents' suit "referrable to arbitration" under such agreement? These were the sole questions presented by petitioner's application for a stay of the action pending arbitration pursuant to Section 3 of the Arbitration Act.

Both the District Court and the Circuit Court found there was a binding and enforceable agreement between the parties for arbitration "of any difficulty or disagreement * * * in any way growing out of the relations of the employers and employed * * *". Moreover, both courts determined that respondents' claims for unpaid wages, while grounded upon the Fair Labor Standards Act, are within the scope of this agreement for arbitration and constitute an arbitrable issue under Section 3 of the Arbitration Act. In so ruling, both courts followed the Circuit Court's earlier decision in *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3.*

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* While the arbitrability of an employee's claim for unpaid wages under Sections 6 and 7 of the Fair Labor Standards Act is of itself a novel question in this Court and one where conflict exists between the Third Circuit (*Donahue* case, *supra*) and the Sixth Circuit (*Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876), this petition does not directly present the question because its answer by the Third Circuit Court of Appeals in the present case was favorable to petitioner.

Another novel question raised by this record but not presented by this petition for the same reason is reflected in the differences between the majority court and Judge McAllister as to the interpretation and scope of Section 3 of the United States Arbitration Act.

The District Court stayed the trial of the action without qualification, pending arbitration of respondents' claims. The Circuit Court affirmed the stay order, with modifications, saying: "Our conclusion is that the matter should proceed to arbitration, but only in accordance with the rulings of law hereinafter set forth."

While ostensibly permitting the arbitration of respondents' claims to proceed in accordance with the agreement of the parties, the Circuit Court, in fact, has almost completely usurped the function of the arbitrators both as to issues of law and fact. Moreover, it has done so on the basis of the pleadings and a limited stipulation of facts without opportunity to petitioner at any time or in any forum to develop the full and relevant facts of the employment relationship with respondents.

The essential vice of this action by the Circuit Court readily appears upon analysis of the pleadings. Each respondent's claim for unpaid wages breaks down into three related sub-issues: (1) How many overtime hours did each respondent work? (2) What hourly rate of pay did each respondent receive in the successive periods of employment here involved?* (3) Did petitioner pay each respondent time and one-half his applicable regular hourly rate for all overtime hours during the successive employment periods in accordance with Section 7 of the Fair Labor Standards Act?

Of these three integrated subissues, only (1) relating to the question of overtime hours is left for arbitration under the Circuit Court's opinion and order. The other issues as to the operative hourly rates and petitioner's

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* The Circuit Court's opinion refers to three periods of employment: October 24, 1938 to November 1, 1939; November 1, 1939 to May 1, 1941; and May 1, 1941 to November 30, 1942, the terminal date of respondent's claims as pleaded.

payments, are determined by the Circuit Court on a record liberally characterized as "meager",* in such a way as to foreclose any consideration of them by the arbitrators.

The injustice of the Circuit Court's action is highlighted by further brief consideration of the nature of these sub-issues and their summary treatment by the Court.

For the first period of employment, October 24, 1938 to November 1, 1939, there is no dispute as to the applicable hourly rates. Moreover, petitioner concedes that currently during this period it did not pay respondents in accordance with Section 7 for any overtime actually worked (the exact number of overtime hours claimed by respondents is disputed in virtually every instance). But petitioner does claim that any liability that may have accrued to individual respondents for this period was paid by the Wage Agreement of May 20, 1941 (effective May 1, 1941) wherein employees of the class represented by respondents were given a wage increase or adjustment roughly equivalent to 10% of their previous weekly earnings (including overtime) for the duration of the new agreement (that is, to April 30, 1943) in "full settlement and satisfaction of all their claims, if any, for overtime against any signatory arising out of employment prior

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* This characterization is borrowed from the Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as *Amicus Curiae* (footnote 6, p. 7) filed in the Circuit Court. The Administrator's apprehension of this deficiency is further manifest from the following statement in his brief (footnote 14, p. 14):

> "If the evidence in the present record does not conclusively establish the artificiality and invalidity of the formula, at least it reveals the *necessity for further inquiry into the facts regarding its application and operation before it can be held valid.*" (Italics ours.)

to May 1, 1941". This settlement of liability paid, as it was, by installments over a two year period, represented a substantial sum in the case of each respondent.*

The Circuit Court summarily decided that this settlement was invalid under *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, on the speculative assumption that it was not "the result of a bona fide dispute with respect to coverage or amount", and, therefore, not within the area of the question reserved by that case.** But petitioner has never had its "day in court" to show the circumstances under which this settlement was reached with the United Mine Workers of America as collective bargaining agent for respondents!

Respondents in their answer to petitioner's application for a stay, did not specifically allege the invalidity of this settlement. Hence petitioner should not now be penalized for any failure to allege further facts showing the exist-

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* While the exact amount of the settlement in a given case cannot be computed on the basis of the meager and incomplete figures appearing in the record, a rough idea can be obtained from the following illustration:

Respondent X worked regularly 56 hours per week. During the period October 24, 1938 to November 1, 1939 he worked 12 hours overtime (the standard then being 44 hours per week, not 40 as now) for 50 weeks or approximately 600 overtime hours. Assuming X's regular hourly rate was $1.00 per hour, petitioner's liability under Section 7 of FLSA would be $300 for overtime plus an equal amount of liquidated damages, or a total of $600.

Before the agreement of May 20, 1941 became effective Employee X's regular weekly earnings (including overtime) were $56 per week. Under the settlement clause of the 1941 agreement, X received roughly 10% additional each week for two years in payment of the liability. Assuming he worked 100 full weeks during that period, he was paid $560 against the liability of $600 which included both overtime and liquidated damages.

** Presumably the question reserved in the *Brooklyn Savings Bank* case, will be explored by the Court in *D. A. Schulte, Inc.* v. *Gangi*, No. 517, certiorari granted Nov. 19, 1945.

ence of a bona fide dispute. Nor could petitioner anticipate this Court's decision in the *Brooklyn Savings Bank* case and foresee the relevance of such additional facts. And, in the last analysis, as the District Court held, the validity or invalidity of the settlement did not affect or alter the obligation of the arbitration agreement and was not a relevant issue in the proceedings for a stay under Section 3.

In any event, the pleadings show for this first period of employment, as well as for the subsequent periods, that there were and are substantial differences between the parties as to the hours of overtime actually worked. Moreover, while in its answer served in May, 1943, petitioner does not dispute coverage of the Act, it should not be precluded from showing that in May, 1941 when the settlement was effected, prior to *United States* v. *Darby*, 312 U. S. 100, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and other leading cases construing the Act (*e. g.*, *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 and *Jewell Ridge Coal Corp.* v. *Local 6167*, 325 U. S. 161), substantial questions existed as to the validity of the Act, its application to these employees, and the effect of a collective bargaining agreement providing earnings far in excess of the Act's minimum requirements.

Further, petitioner has never had any opportunity to show the circumstances surrounding this settlement, that respondents received the approximate 10% wage increase for the two year period of the new wage agreement only as a settlement of alleged overtime claims under the Act and not because of "economic pressure by the bargaining agent" or "naturally on a rising wage scale market", as the Circuit Court gratuitously suggests might have been the case. The Circuit Court says "we do not know nor see how it could be demonstrated, how much of the increased wage scale was for payment of compensa-

tion due under the Act" and how much of it for other factors suggested by the Court. But the decisive fact remains that petitioner has never been given a chance to make the demonstration!

Even assuming the settlement is found eventually not to preclude respondents' claims under the Act for the period prior to May 1, 1941, because not within the area reserved by the *Brooklyn Savings Bank* case or because of some further limitation of that area by this Court in a subsequent case or cases, petitioner is entitled, at least, to show the amount of the additional sums paid in the settlement and to apply such sums as a set-off against the liability. While the Circuit Court's opinion is not clear on the question of a possible set-off (the question was not discussed in the District Court's opinion nor in the briefs of the parties either in the District Court or Circuit Court because it was suggested for the first time by the unusual treatment accorded the case in the Circuit Court), we read the opinion as foreclosing any such action by petitioner in the limited arbitration proceedings contemplated by the Circuit Court's opinion and order.*

With respect to the second and third periods of employment, petitioner has also been denied its "day in court". For both periods, November 1, 1939 to November 30, 1942, respondents' hourly rates were fixed pursuant to

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* The Circuit Court ended its discussion of the settlement as follows: "Our conclusion is that the terms of the new wage scale is not a settlement sufficient under the Act in the light of the Supreme Court decisions above cited." (The only case cited in this Court is *Brooklyn Savings Bank* v. *O'Neil*.) Whether or not a past liability under FLSA can be paid in whole or *in part* by the payment of higher wage rates and higher earnings than the employer would have paid in the absence of a settlement of the liability, is a novel question never determined by this Court nor, to the best of our knowledge, by any court other than the Third Circuit Court in this case. As such it is one of the questions presented by this petition.

formulae prescribed by the collective bargaining agreements and ratified by the parties.*

For this period following November 1, 1939, the pleadings raise issues not only as to the actual hours worked overtime, but also regarding the applicable hourly rates. Petitioner pleaded that the rates fixed by the formulae under the Wage Agreements of May 26, 1939 and May 20, 1941 were bona fide rates which actually governed the employment relationships between the parties. Concededly, if the rates established by the agreements were real rates, respondents were paid in accordance with Section 7 of the Act for all overtime hours. No question was raised by respondents either in the District Court or in the Circuit Court that petitioner had failed to comply with the agreements.

The fundamental issue for the period after November 1, 1939 then remained. Were the hourly rates fixed by the agreements real or fictitious?

This issue called for a careful examination of the relationship of the parties and inquiry, among other facts, as to whether the rates established by the formulae were translated to petitioner's payrolls, whether respondents knew the rates so established and whether petitioner actually calculated respondents' earnings on the basis of such agreed rates.

This issue—which petitioner believed it had the right to present to the arbitrators as triers of fact or, in any

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* While the Circuit Court's opinion treats the period November 1, 1939 to May 1, 1941 as distinct from the period after May 1, 1941, because the hourly rate formula was specifically set forth in the agreement covering the latter period, but only authorized by the prior agreement and the subsequent related resolution of the Board of Conciliation, petitioner's argument that it has been foreclosed from offering evidence to show the actual operative rates is the same for both periods.

event, if erring in its claim for arbitration, to the District Court and a jury—the Circuit Court seized upon and finally determined without opportunity to petitioner for presentation of its evidence.

The method and reasoning whereby the Circuit Court summarily decided this issue is rather transparent. The formula rates are held fictitious and, therefore, not lawful rates upon a finding that the formula rates were not in fact the rates paid; and this finding is based upon the stipulation with respect to the due bills, making that stipulation conclusive upon petitioner contrary to the intention of the parties as expressed in the stipulation.

All the opinion of the court except that section under the heading: "The Formula" is expressly based upon the due bills of Sawczak and Hohn. It is equally clear that the portion under "The Formula" rests upon this basis also. In the opinion it is said (R. 92):

> "But whether the regular rate was explicitly stated or had to be figured out as indicated, the essential test of its sufficiency was whether it was an actual regular rate or a fictitious one."

And later (R. 93) referring to the case of *Walling* v. *Helmerich & Payne,* 323 U. S. 37 (1944), it is further said:

> "There was thus an apparent compliance with the Act. But actually because of the figures at which the new regular rate was set, exactly the same wages as before were paid. This is precisely what has occurred under the formula of the instant case."

And finally (R. 95):

> "The evidence already marshalled is clearly indicative that the formulae were directed only to one goal, *i. e.,* to continue the old methods of payment for work while ostensibly meeting the requirements of the Act technically and technicalities are not enough."

The formulae are condemned because "conditioned upon maintaining actually and essentially the same *mode of payment* as before the Act" (R. 94) and "the same *payment practices* as hitherto" (R. 95).

The "evidence already marshalled" and "payment practices" can only refer to the due bills and inferences drawn from them, because there is no other evidence in the record on the subject. There is nothing in the formulae as such to indicate hourly rates established by them were not actual but fictitious.

"Nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously so long as the new rate equals or exceeds the minimum required by the Act." *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 630. A purport either expressed or implied to accomplish that end, which has been expressly held to be lawful, cannot be evidence that a rate so designed is fictitious.

It is apparent, therefore, that the conclusion that the hourly rates established by the formulae were fictitious rests upon the inferences drawn by the Circuit Court from the due bills.

The only purpose of the preliminary hearing under Section 3 of the Arbitration Act was to determine whether the tribunal for the determination of respondents' claims for unpaid wages under the Fair Labor Standards Act, and the three related subissues of overtime hours, hourly rates and payment, was the District Court or the Board of Conciliation as arbitrator. The stipulation on which the Circuit Court has acted as though it were final and binding, was clearly limited in extent and for a limited purpose. It did not purport to contain all of the facts relevant to the controversy or necessary for its decision,

nor did it contemplate a final decision upon the merits of any part of the case.*

The Circuit Court's modification of the order of the District Court has made a final determination that the settlement effected in the May, 1941 agreement is of no validity—even as a set-off against any liability proved by respondents—and that the hourly rates established by the formulae of the May, 1939 and May, 1941 agreements are fictitious. Petitioner's evidence with respect to these issues has not been heard and petitioner has been shut off from all opportunity for presenting such evidence at any future time.

If the Circuit Court had reversed the order of the District Court staying proceedings until arbitration had been had, the case must have been remanded to that court for trial upon the merits. In sustaining the order, a full hearing on the merits should likewise have been permitted before the Board of Conciliation.

II. The Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

(A) The Court below did not articulate its power under Section 3 or other provisions of the Arbitration Act to prejudge the issues of law and fact. Its power to do so clearly presents a novel question in this Court.

As a preliminary proposition, it is highly doubtful that Federal Courts have any power to interfere with arbitration proceedings to the extent of deciding arbitrable

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* It is apparent that the agreement was not intended to be final for all purposes of the case and that defendant had some explanation and evidence in respect to these due bills which it reserved the right to offer at a hearing on the merits of the case either in the District Court or before the Board of Conciliation, whichever should be held to be the proper forum for trial.

issues of fact and law. Arbitrators are, of course, bound to follow the law. But it has been held that an award may not be set aside for a mistake of fact or law. *James Richardson & Sons* v. *W. E. Hedger Transportation Corp.*, 98 F. 2d 55, cert. den. 305 U. S. 657; *Mutual Benefit Health & Accident Association* v. *United Casualty Co.*, 142 F. 2d 390, cert. den., 323 U. S. 729. If Federal Courts do not have this right *after* award, it would seem, *a fortiori*, they do not have the right to determine the facts and law *before* arbitration, as in this case. The only conceivable justification for such action might be the "private-public character" of the rights (see *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 709) asserted by respondents in this case, though we find no suggestion of any such distinction in the cases.

Secondly, if there is any justification for judicial interference in the actual arbitration proceedings contemplated by petitioner's application for a stay, the Federal Courts, at least, are seemingly without power in this case. On respondents' failure to submit their wage claims to arbitration by the Board of Conciliation in accordance with the collective bargaining agreements, petitioner could not affirmatively compel such submission pursuant to Section 4 of the Arbitration Act. Petitioner endeavored to obtain such an order but the District Court ruled against it (R. 71-72).

Jurisdiction to compel arbitration under Section 4 is apparently limited by Section 2 of the Arbitration Act to "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce", whereas power to grant a stay under Section 3, is not so confined, but extends to arbitration proceedings exclusively within the jurisdiction of the state courts. Cf. *Shanferoke Co.* v. *Westchester Co.*, 70 F. 2d 297, affirmed 293 U. S. 449. Thus, even if the right to supervise an arbitration on questions of fact or law is to be

derived from the power to order and compel arbitration, no such case is presented here.

Because of the apparent limiting effect of Section 2 on all provisions of the Arbitration Act except Section 3, it would also follow that if respondents voluntarily proceeded to arbitration of their claims against petitioner before the Board of Conciliation, summary proceedings to confirm, vacate or modify any award of the arbitrators pursuant to Sections 9, 10 and 11 of the Arbitration Act could not be maintained. In that event, such proceedings would seem to be cognizable only in the Pennsylvania courts under the equivalent provisions of the Pennsylvania Arbitration Act (1927, April 25, P. L. 381, No. 248, Sections 9, 10 and 11; 1 Purdon's Penna. Statutes Annotated, Sections 169, 170 and 171).

If a Federal Court acting under Section 3 and deriving its power from that section alone has any rights of supervision over the arbitration proceedings, it is confined to ascertaining that the applicant for the stay "is not in default in proceeding with such arbitration" (See opinion of Learned Hand, J. in *Shanferoke Co.* v. *Westchester Co.*, 70 F. 2d 297, at p. 299). The court in this case has far exceeded that limit.

(B) The third question presented by this petition has been discussed at some length in connection with the first question. It was there pointed out that the Circuit Court summarily decided that the settlement of liability contained in the agreement of May 20, 1941 is not effective, because there are no facts to show a bona fide dispute with respect to coverage or amount within the area reserved in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 703, 714. Petitioner claims substantial prejudice because foreclosed from showing the existence of such a dispute.

Moreover, rejecting the settlement as a complete bar to any prior liability under the Fair Labor Standards Act, the Circuit Court has also foreclosed even a partial set-off against such liability. Payment of higher future wages in consideration of a settlement can never be payment, *in whole or in part*, of a liability under the Act, seems to be the rationale. Perhaps the Circuit Court meant to say that it was not persuaded that the higher future wages were *in fact* payment, in whole or in part, of the liability in this case. If so, petitioner's grievance rests wholly within the first question presented.

The ruling is much broader and apparently precludes consideration of a set-off by petitioner as a matter of law. Indeed, it implies that any installment payment of a wage and hour liability linked to wages for some subsequent period of employment, is of no force and effect under the Act.

The question has never had the attention of this Court and should now be answered as one important in the administration of the Act.

Conclusion

It is respectfully submitted that this case presents a proper occasion for the exercise of the supervisory power of this Court.

THE HUDSON COAL COMPANY,
Petitioner.

By WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

December 29, 1945.

Appendix

United States Arbitration Act

§ 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agree-

ment, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of ap-

plication, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Fair Labor Standards Act

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the

employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

JAN 16 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM
NO. 703

THE HUDSON COAL COMPANY,
Petitioner

against

ARJA WATKINS, et al.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term

No. 703

THE HUDSON COAL COMPANY,
Petitioner

against

ARJA WATKINS, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 54 F. Supp. 953 and appears in the printed record (R. 63-72).

The opinion of the Circuit Court of Appeals is reported in 151 F. 2nd 311 and is also printed in the record (R. 80-100).

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by Sec. 240(a) of the Judicial Code, 28 U. S. C. Sec. 347(a) as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The Statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201).

COUNTER-STATEMENT OF THE CASE

This is a civil action brought by Respondents to recover unpaid statutory overtime wages as provided in Section 7 (a) of the "Fair Labor Standards Act of 1938" (Act of Congress June 25, 1938, Chapter 676 U. S. C. A. Title 29, Sec. 201 et seq.) and liquidated damages and a reasonable attorneys' fee and costs as provided in Section 16 (b) of said Act.

The Complaint filed in the lower court set forth each Respondent's claim under proper specific subdivisions. In view of the fact that the Respondents were all employed in either of two general groups (a) those employed upon an hourly basis or (b) those employed on a monthly salary basis, only two specific claims of men employed in each class has been included in the Record on Appeal because of the fact that the decision upon the facts shown in these specific cases would govern all cases or claims involved.

The Respondents did not plead the contract between the United Mine Workers of America and the Anthracite Operators as the basis of their action. Their theory of the case was that the aforesaid contract by virtue of the addition of the May 20, 1941 portion thereof (Exhibit P, Page 42 R.) was rendered illegal and void by virtue of Section (7) thereof, so that Respondents were not bound by such illegal contract; that further Respondents were entitled to sue under the "Fair Labor Standards Act of 1938" for unpaid statutory overtime wages and penalties.

The Petitioner in its answer pleaded the contract between the United Mine Workers of America and the An-

thracite Operators (Exhibit A to Q, inclusive, Page 13-36 inclusive Record) and based its defense upon said contracts.

The complaint and answer, as shown by the four specific claims made part of the Record (Pages 1 to 13 R., inclusive) show that the claims are each divided into three separate periods, to wit: (1) October 28, 1938 to November 1, 1939, the latter date being the effective date of Resolution of the Board of Conciliation (Exhibit "Q", Page 44 R.) (2) November 1, 1939 to May 1, 1941, the effective date of the May 20, 1941 agreement (Exhibit P, Page 42 R.) (3) period of employment subsequent to May 1, 1941.

No time and one-half the regular rate of pay has ever been paid any Respondent for overtime work performed during any period; the defense to the claims for overtime wages and liquidated damages for period (1) is based upon the waiver or release clause of the 1941 agreement aforesaid (Exhibit P, Page 42 R.)

As to period (2) defendant averred payment was made in accordance with a formula which the Petitioner asserts was adopted (by implication) by the Resolution of the Conciliation Board of Sept. 5, 1939 (Exhibit Q, Page 44 R.) or by such a formula adopted by Petitioner pursuant thereto; Petitioner asserted, in its written brief in the lower court and in argument, that such formula must necessarily have been the same as the latter formula placed into writing by the 1941 Agreement (Exhibit P, section 7, Page 42 R.); Respondents contended that the said Resolution of the Conciliation Board (a) did not adopt any formula (b) that if the Resolution did adopt the formula contended for by the Petitioner or (c) if the Petitioner adopted such formula, that the same was illegal and void; that payment under

such formula method of computation was not payment in accordance with the provisions of the Fair Labor Standards Act; that the regular rates of pay were the same rates averred and admitted as existing during period (1) and not the "formula" rate there having been no reduction of said rates; (d) that no payment for overtime work at one and one-half times the said regular rates having been made to any Respondent by Petitioner, the waiver or release clause contained in the 1941 agreement was no defense to Respondents' claim for the unpaid wages and liquidated damages.

The Petitioner's answer to the complaint specifically admits that Respondents each worked certain averred statutory overtime hours in periods (1) and (2). The answer, in most cases, admits the regular rate of pay averred as being paid each Respondent in the complaint during period (1); as to period (2) it denies the correctness of these same rates and alleges lower rates were paid by reason of its computation of the so called "hourly rates" in accordance with the "formula" which it alleged was adopted by the Resolution of the Conciliation Board (Exhibit Q, Page 44 R.) to ascertain these rates.

As to period (3) Petition avers that payment of time and one-half for all statutory overtime hours was paid to Respondents in accordance with Section 7 of the 1941 agreement between the United Mine Workers of America and the Anthracite Operators (Exhibit P, Page 42 R.).

As to the regular rate of pay for period (1) Respondents employed on an hourly basis, in their complaint, averred regular rates of pay which are admitted; those on a monthly basis averred monthly rates (which are admit-

ted) and hourly rates computed under the rule of the *Missell Case,* 62 S. Ct. 1216 (316 U. S. 572). The correctness of this latter computation is not admitted though no different hourly rates are averred.

As to period (2) Respondents pleaded these same rates of pay. (The Record shows there is no contract reduction pertaining to these rates, the evidence by stipulation shows they were the rates paid.) (See due bills Pages 56 to 63 R.)

As to period (3) the percentage increases given in the 1941 contract (Exhibit "P", Page 42 R.) are added to the rates of pay admitted as being correct for period (1) and which Respondents contended continued up to the adoption of the 1941 contract aforesaid.

The Petitioner contends the regular rate of pay for period (2) and (3) is arrived at by the contract formula contained (by implication) in the Resolution of the Conciliation Board, Sept. 5, 1939 (Exhibit Q, Page 44 R.) and the Union-operators Agreement of May 20, 1941 (Exhibit P, Page 42 R.)

Due bills attached as exhibits by stipulation (R. 52) are evidence of the correctness of the regular rates of pay alleged by each Respondent for all periods and show no computation of overtime pay (R. 56-63).

Petitioner in its answer and by application for preliminary hearing (Page 46 R.) prayed that Respondents be required to proceed to arbitration.

Respondents pleaded (R. 48) that the contract pleaded in defense was (1) not binding upon them and outside of the scope of the authority of the United Mine Workers

Union to so contract for them (2) illegal, void, against public policy and not binding upon them for specific reasons and (3) not being a proper binding contract and being illegal etc., was not a proper subject for arbitration and (4) that the contract between the United Mine Workers and the Operators providing for arbitration could not therefore be enforced (Page 48 R.) and contended further that the action should not be stayed. Thus the very contracts which the Petitioner pleaded in defense were attacked; Respondents contend that the question of the legality of these contracts must be determined as a preliminary legal question by the Courts before the question as to whether they must proceed to arbitration could properly be decided. In support of this theory Respondents cited the decision of the Circuit Court of Appeals, Second Circuit, *In Re: Palberg Petition*, 131 F (2) 968 which held:

> "Arbitration may be compelled except as to the issue whether the contract containing the clause was ever made or was void for fraud or other illegality"

also, *Williston on Contracts* (Revised Ed.), Sec. 1020, Vol. 6, Page 5369; *American Jurisprudence*, Vol. 3, Page 841, sec. 11, Paragraph 4; *Hoffman vs. McMillen*, 174 U. S. 639, which they contend support their position.

The District Court held (Page 63 R.) (a) that it was not necessary to pass upon the legality of the release or waiver clause contained in Section 7 of the aforesaid 1941 contract (*supra*); (b) that it was not necessary to decide the question as to the legality of the "formula" which Petitioner contends was, by implication, adopted by the Resolution of the Conciliation Board of Sept. 5, 1939 (*supra*); (c) that the formula method of computation of the so called "hourly rate" contained in Section 7 of the 1941

contract was legal, and stayed the action until arbitration between the parties.

Upon appeal the Circuit Court of Appeals (Page 89 R.) by unanimous decision held (1) that the defense which Respondents designated as a waiver or release was not a sufficient settlement and not a good defense against respondents' claims up to May 1, 1941 (2) that no formula for ascertaining a so called "hourly rate of pay" was ever adopted by the Conciliation Board, or if authorized or intended, was never applied by the Petitioner nor put into operation by Petitioner in the computation of Respondents wages and the old rates of pay were never changed and were in fact paid to Respondents (3) that the formula adopted by Section 7 of the 1941 contract between the United Mine Workers of America and the Operators was illegal and void—this said the court also applied to the formula which Petitioner contends was by implication adopted by the 1939 Resolution of the Conciliation Board, if such had been adopted thereby.

ARGUMENT

THE PETITION SHOULD BE DISMISSED AND WRIT DENIED

1. The Circuit Court of Appeals Had Authority to Decide the Questions Presented

The Petitioner asserts that the Circuit Court of Appeals exceeded its authority in deciding the questions presented on the appeal; that the only question which it should have decided was whether the lower court was correct or in error in staying the action. The Respondents contend that the Circuit Court of Appeals had jurisdiction to and properly determined the questions as to the legality of the contract.

This is a case in which (1) the existence of a binding contract between the parties and (2) the legality of the contract, which Petitioner says must be arbitrated, is questioned. These legal questions were argued in the District Court; the District Court decided that the formula contained in the 1941 contract was legal. (Even if we consider this question from a narrow scope Respondents argue that to have allowed this erroneous decision to stand for arbitrators to follow would have been a travesty of justice.) Upon appeal the legal questions were argued again. The Petitioner here for the first time asserts that a court of law cannot reverse the decision of an arbitrator for a mistake of law or fact, therefore the Circuit Court erred

when it decided the legal questions presented instead of leaving them to the arbitrators to decide.

This case does not deal with the question of the power of a court to reverse the decision of arbitrators who have decided a question of fact and applicable law, in a question properly before arbitrators, because of alleged error of law or fact. That was the situation in the following cases cited by Petitioner, to wit, *Richardson & Sons vs. Hedger Co.*, 98 F (2) 55; *Mutual Association vs. United Casualty Co.*, 142 F (2) 390; *Shanferoke Co. vs. Westchester Co.*, 70 F 2d 297. This case is one wherein the jurisdiction of the arbitrators, to arbitrate an illegal contract, because the very contract sought to be arbitrated is illegal and void, is preliminarily questioned; *In Re: Palberg Petition*. 131 F (2) 968; *Williston-Contracts* (Rev. Ed.) sec. 1020, Vol. 6, Page 5369; *American Jurisprudence*, Vol. 3, Page 841, sec. 11 Paragraph 4; *Hoffman vs. McMillen*. 174 U. S. 639 and court had jurisdiction and power to determine the question involved. In *Shanferoke Coal Corporation vs. Westchester Service Corporation*, 55 S. Ct. 313, 293 U. S. 449, it was held that a special defense setting up the arbitration agreement and motion for stay constitutes an application of "interlocutory injunction" and an order thereon is appealable under section 129 Judicial Code as amended (28 U. S. C. A. 227). The Circuit Court is not limited on such appeals to the simple question as to whether or not the District Court was in error in ordering a "stay" especially since the District Court had considered the merits of the legal question and the pertinent facts were agreed upon between the parties: *Meccano Ltd. vs. Wanamaker*, 253 U. S. 136 at 140; *Eagle Glass and Mfg. Co. vs. Rowl*, 245 U. S. 275 at 280.

2. The Circuit Court Properly Decided the Questions Presented

The Circuit Court decided that no change was made in the admittedly correct regular rates of pay paid Respondents during period (1) by the Resolution of the Conciliation Board (Exhibit Q), (a) because the Petitioner continued to actually pay at the old admitted rate of pay, (b) also because, as shown in the portion of the opinion entitled "Formula", if such formula contended for was adopted it was illegal, so that these same rates continued during period (2).

This finding was supported by substantial evidence (See due bills Pages 56-63 R.) and inasmuch as the question as to the legality of the last paragraph of Section 7, 1941 Contract (Exhibit P, Page 42 R.) would have affected claims in this period it was a question which the court could properly consider; substantial evidence, the actual due bills for the representative Respondents for the period in question, being before the court its finding should not be disturbed. *Southern Power Co. v. North Carolina Public Service Co.*, 44 S. Ct. 164—(263 U. S. 508); *General Talking Pictures Corp. v. Western Electric Co.*, 58 S. Ct. 849 (304 U. S. 849); *Alabama Power Co. vs. Ickes*, 58 S. Ct. 300, 302 U. S. 464.

If this then is correct we find that there was no money, other than straight time wages, ever paid for the admitted statutory overtime hours worked by Respondents between October 1, 1938 and May 1, 1941; that being so Section 7(a) of the "Fair Labor Standards Act" was not complied with and Respondents were entitled to recover for the

statutory overtime hours these unpaid wages and liquidated damages as provided in Section 16(b) of said Act unless the last paragraph of Section 7 of the 1941 agreement between the United Mine Workers and the Operators is a good defense (Page 42 R.) This section of the agreement provides inter alia:

> "The wage adjustments provided herein for employees working forty-two hours a week, or more, constitute full settlement and satisfaction of all their claims, if any, for overtime against any signatory operator arising out of employment prior to May 1, 1941".

It is to be found from the record that no employee had made a claim up to this time for payment; there could not have been a dispute as to coverage or any serious dispute as to the hours worked; not one cent was paid in consideration to the various employees; this was money *which the individuals were entitled to, as individuals*, yet it is the general agreement between the Union and the Operators which Petitioner says is a defense to this action; there was no dispute or claim presented by any individual employee or by the Union for any individual employee or group of employees at this time. It was only that the operators foresaw the probability of claims in the future which caused the insertion of such a clause. This is evidenced by the Resolution of the Conciliation Board in 1939 (Exhibit Q, Page 44 R.).

What is it which Petitioner claims constitutes payment of these claims up to May 1, 1941? It is the preceding paragraph of Section 7 of the 1941 Agreement (Page 42 R.) which provides that "hourly rates" of employees of the class to which Respondents belong

"Shall be established for the period May 1, 1941 to September 30, 1941 by adding 7½% to their weekly earnings as calculated under the provisions of said agreement" (Agreement of May 7, 1936) "and dividing the sum by the hours regularly employed weekly plus one half the hours worked in excess of 40 hours; and for the period October 1, 1941 to April 30, 1943 by adding 10% to their weekly earnings, as calculated under the provisions of said agreement (of May 7, 1936) and dividing the sum by the hours regularly employed weekly plus one-half the hours worked in excess of 40 hours".

The defense claims that the rate increase granted by this section of the contract is such consideration as amounts to an accord and satisfaction of the claims for overtime statutory wages and penalties up to May 1, 1941. However Respondents call the court's attention to Exhibit "P" (Page 42 R.) being portions of this same contract.

This exhibit shows that all the other employees in the anthracite industry received like percentage increases; these other employees only worked a 35 hour work week as provided by the contract agreement of May 7, 1936 (Exhibit M, Page 37 R.) whereas Respondents being men who because of the nature of their jobs had to work statutory overtime, had considerable accumulated unpaid overtime due them up to this time; nevertheless it is only as to these men "who customarily work" statutory overtime that Petitioner claims that the increased wage for future work is payment by accord and satisfaction by virtue of said 1941 Agreement; all other employees received the increase without giving up any such right.

It is to be noted that this agreement did not guarantee any of the Respondents any employment for any period of time in the future; and it is to be further noted that this agreement is not an agreement between any individual employees to whom the claims are owed and the Petitioner, but it is an agreement between the United States Mine Workers Union and the Operators.

Respondents contend that the agreements were not payment by accord and satisfaction and that the decision of the Circuit Court of Appeals is correct and one which has been previously decided by this Court and other Circuit Courts: *Brooklyn Savings Bank vs. O'Neill*, 65 S. Ct. 895; *Fleming vs. Post*, 146 F 2-441; *Fleming vs. Warshawsky*, 123 F (2) 622; *Rigopoulous vs. Kervan*, 140 F (2) 506. The Respondents contend this was an attempt by the bargaining unit to release or waive their individual claims and such release or waiver is invalid: *Dize vs. Maddix*, 65 S. Ct. 895; *Elgin J. & E. Ry. Co. vs. Burley*, 65 S. Ct. 1282.

The Circuit Court's decision as to the illegality of the Formula for ascertaining the various respondent's rate per hour contained in Section 7 of the 1941 contract is a correct decision. Under the formula the so called "hourly rate" is not the hourly rate paid the respondents employed on an hourly basis for the normal, nonstatutory hours worked; it is a fictitious figure or result arrived at by the multiplication of the starting hourly rate by the total hours worked divided by the total hours worked plus one-half of the total statutory overtime worked; this results in the continued, successive, reduction of the starting rate per hour with each statutory overtime hour worked. The same is true of those respondents employed on a monthly salary basis; instead of using the rule of the Missell case (*supra*)

this formula requires that the so called "hourly rate" is to be a figure or result arrived at by dividing the weekly salary by the total hours worked plus one-half of the total statutory overtime hours worked; such a rate Respondents contend is fictitious. To declare such "Formula" legal would, we submit, circumvent the overtime requirements of the Fair Labor Standards Act. This formula, so long as one of the employees of the class to which Respondents belong, worked 40 hours a week or less did not affect the basic starting rate of pay at which the said employee was employed. However when statutory overtime hours are worked the formula automatically, with each additional overtime hour worked reduces the "rate per hour" below the starting "regular rate" paid for nonovertime hours, for every additional statutory overtime hour worked in such equal proportion that the total pay for straight time and statutory overtime which an employee is entitled to under this formula can never be greater than the sum total of the hours worked multiplied by the starting rate per hour; or in the case of the employees paid on a salary basis, would not exceed the regular salary. *Missell vs. Overnight Co.*, 316 U. S. 572, 62 S. Ct. 1216; *Walling vs. Stone*, 131 F (2) 461; *Patsy Oil Case*, 132 F (2) 826; *Seneca Coal & Coke vs. Lofton*, 136 F (2) 359; Cert. denied 64 S. Ct. 77; *Green Head Bit. Co. vs. Walling*, 138 F (2) 453.

CONCLUSION

The Board of Arbitrators provided for under the contract between the United Mine Workers of America and the Operators (Sec. IV, Page 33 R.) is the Board of Concilia-

tion composed of six persons, three appointed by the Union and three appointed by the Operators; if this Board agrees on a decision it is final and binding upon all parties.

The Petitioner would have this court say that the decision as to the legality or illegality of the portions of the contract, which Respondents contend to be illegal, must not be decided by a court of law who Petitioner asserts can only decide whether the arbitration clause is enforceable or not leaving the other question for the arbitrators to decide.

In this case, if this were so, the very parties to the contract, which Respondent assert is illegal and null and void, would be the judges of the legality of their own contract.

All of the legal questions presented by the petition have been previously decided by the Supreme Court of the United States and it is respectfully submitted that the decision of the Circuit Court of Appeals conforms to these various decisions of Your Honorable Court.

For the foregoing reasons the writ should be denied.

Respectfully submitted,

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FEB 28 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 703

THE HUDSON COAL COMPANY,

Petitioner,

against

ARJA WATKINS, et al.,

Respondents.

PETITION FOR REHEARING

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Hudson Coal Company, respectfully prays for a rehearing of the order of this Court dated February 4, 1946 denying its petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit and assigns therefor the following reasons:

I

Protracted litigation affecting thousands of employees in the Anthracite Industry appears unavoidable unless there is a final and authoritative determination of the second and third questions presented by the petition.

The present case involves thirty-eight (38) employees of a single anthracite producing company. There are at

least four thousand (4,000) employees of more than one hundred (100) other employers in the Pennsylvania anthracite fields who undoubtedly will assert immediate claims under the Fair Labor Standards Act of 1938 on the basis of the Circuit Court's ruling in this case. Moreover, viewing that ruling from the broader viewpoint of its effect on the judicial functions of the Anthracite Board of Conciliation as ultimate arbiter of all wage disputes in the Industry, it affects the entirety of the Industry's seventy-five thousand (75,000) organized employees.

Consistent with the modern trend towards arbitration of labor disputes, the Third Circuit Court determined in this case and in its previous decision, *Donahue* v. *Susquehanna Collieries Company,* 138 F. 2d 3 (1943), that an employee's claim for additional wages under the Fair Labor Standards Act is subject to arbitration where the employer and employee have so agreed.*

Petitioner's quarrel with the Circuit Court begins with the ruling that the legality of the hourly rate provisions of the successive anthracite wage agreements covering employees in "occupations continuously manned" for the period November 1, 1939 to April 30, 1943 (R. 41-45) and the legal effect of the settlement agreement contained in Section 7 of the 1941 Agreement (R. 44), are questions of law "which the Court must take responsibility in answering" (R. 96).

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* For indications of the use of arbitration to settle such disputes in other industries, see 9 Wage and Hour Reporter 3, January 7, 1946.

No challenge of this principle was made in this case by cross-petition nor did the employees in the *Donahue* case, *supra,* seek a review after denial of rehearing by the Circuit Court. To the best of our knowledge, only one attempt has been made to seek a review of this question and in that case, the lower courts had found no occasion to decide the question. See *Clarence Timony, et al.* v. *Todd Shipyards Corporation,* October Term, 1945, No. 758, certiorari denied, February 11, 1946.

The Circuit Court offers no authority to support its usurpation of the arbitral function to determine legal questions other than the existence of the arbitration agreement and respondents' default. To the best of our knowledge, there is no such authority to be found either in the United States Arbitration Act or elsewhere. Certainly the question of the Court's power is a novel one in this Court.

Petitioner goes further. Not only did the Court lack power to decide questions of law affecting the merits of the controversy between employer and employees; it lacked power to decide certain questions of fact as a basis for deciding these legal questions. And even assuming the Court's power in this respect, petitioner has demonstrated at length in its petition (pp. 10-19 incl.) how its case was resolved solely upon a limited stipulation of facts without "its day in court."

The critical issue on the merits in this case is, and in the case of 4,000 additional employees and their 100 employers will be, whether or not the hourly rates under the aforementioned provisions of the successive wage agreements were *bona fide* rates. The Circuit Court's opinion states it thus (R. 92):

> "But whether the regular rate was explicitly stated or had to be figured out as indicated, the *essential test of its sufficiency was whether it was an actual regular rate or a fictitious one.*" (Italics ours.)

Petitioner in this case was never afforded opportunity to show that it actually applied the contract rates in calculating respondents' wages. The stipulated due bills (R. 52-62) were treated as conclusive despite their obvious immateriality in deciding petitioner's motion for a stay pursuant to Section 3 of the Arbitration Act, as the decision of the Circuit Court undeniably demonstrates, and despite petitioner's reservation of right (R. 53) to offer

complete and explanatory evidence in a plenary hearing before the arbitrator or the Court.

If the Circuit Court's decision is now permitted to stand without review by this Court, the District Court inevitably will be called upon by each affected employer, including Petitioner in other cases, to hear the full evidence showing that the formula or contract rates were actually applied and were not fictitious. Depending upon the District Court's findings, the cases will then go to the Board of Conciliation, as indicated by the Circuit Court (R. 96), for determination of the overtime hours worked by each employee and calculation of the amounts due under the Fair Labor Standards Act.

This splitting of the function of adjudicating employees' claims is not only impractical, but it frustrates the long established principle of arbitrating employee wage grievances. It is not limited to claims asserted under the Federal Wage and Hour Act. The traditional wage grievance ordinarily raises one or more legal questions in the form of questions of construction of the collective bargaining agreement and under the Circuit Court's ruling "the Court must take the responsibility" of answering them (R. 96).

The same bifurcation of judgment and attendant confusion will result in subsequent cases when the problem of the scope and effect of the 1941 settlement (R. 42-44) is reached. Dealing with this issue, the Circuit Court properly recognized that *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945), left open the effect of a *bona fide* dispute followed by an accord and satisfaction (a question presumably to be explored in *D. A. Schulte Inc.* v. *Gangi*, October Term, 1945, No. 517, certiorari granted, November 19, 1945), when it said (R. 84):

> "But we do not see how the facts of this case, *at any rate on the state of the record now before us*, bring the claim here involved within the exception

mentioned by the Supreme Court as legally permissible." (Italics ours.)*

In the District Court, petitioner offered no evidence to show that the 1941 settlement was a *bona fide* settlement for the obvious reason that these facts were deemed immaterial to the issue of its right to a stay pending arbitration under Section 3 of the United States Arbitration Act. Both the District Court (R. 71) and the Circuit Court (R. 96) agreed with petitioner's position in this respect. Nevertheless, the Circuit Court *"on the state of the record now before us"*, proceeded finally to determine the issue.

As a measure of self-protection against summary treatment in subsequent cases, petitioner and other employers, will call upon the District Court to hear evidence showing that the United Mine Workers of America, as collective bargaining agent, asserted claims on behalf of the employees in "occupations continuously manned;" that the 10% wage adjustment granted them under Section 7 of the 1941 agreement (R. 43-44) was in "full settlement and satisfaction" of such claims; that there were good grounds for disputing such claims; that this group of employees were treated differently from the much larger group of miners then working a 7 hour day and a 5 day week (who obviously had no claims under the Act while

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* In ruling the 1941 settlement ineffective, the Court below repeated its error of assuming power to decide questions of fact and law, other than the existence of the arbitration agreement and respondents' default, and, in any event, deciding them without affording petitioner "its day in Court." Moreover, on this phase of the case, the Court apparently precluded, as a matter of law, any partial set-off of the amounts paid respondents as increased wages under the 1941 agreement solely as a settlement of their overtime claims under the Fair Labor Standards Act, if any valid claims then existed. We know of no other decision in any Court dealing with this novel question of law. It should be pointed out, too, that this is the only legal question affecting the *merits* of the respondents' case of which petitioner seeks review in this Court. Any ruling on this third question would only serve as a guide to the Board of Conciliation if this Court agrees with our position on the second question.

working a 35 hour week) because of their longer hours and generally higher wage rates and earnings. Depending again upon the findings of the District Court as to the existence of a *bona fide* settlement, the cases would be dismissed or sent to the Board of Conciliation for calculation of any additional wages due the affected employees.

This unhappy division of functions between the Court and the Board of Conciliation can only be resolved by review in this case. For on review, this Court may rule, as petitioner contends, that all questions of fact and law affecting the merits of the controversy are questions for the arbitrator; or it may decide that the Circuit Court was correct in splitting the functions; or conceivably it may rule that claims of this nature are not arbitrable and restore the entire controversy to the District Court for decision.

Whatever this Court might eventually decide, it would be preferable to the unsettled situation resulting from the Circuit Court's decision.

Conclusion

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying its petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit be reheard and reconsidered and that the petition be granted.

THE HUDSON COAL COMPANY,
Petitioner.

By WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

February 26, 1946.

Counsel's Certificate

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.